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No. 83-902

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

BOEING VERTOL COMPANY AND
WILLIAM PLATT,

Petitioners

v.

JOHN F. EDWARDS,

Respondent

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

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1. Did the Court of Appeals err when it held that a class member witness in a race discrimination case, neither a named plaintiff nor an intervenor, who does not challenge the class finding of no company-wide pattern and practice of discrimination, is free to bring his own individual suit, and is not bound by findings concerning him as an individual which the class court had no jurisdiction to make and the Court of Appeals previously refused to review?

2. Did the Court of Appeals err when it held that a class member witness of a F.R. Civ. P. 23(b)(2) class who filed an individual suit before final determination against the class is entitled to the tolling of the

statute of limitations from the filing of the class action?

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APPLICABLE SECTIONS OF F.R. Civ. P. 23 OMITTED BY PETITIONERS

Rule 23. Class Actions

(a) Prerequisites to a Class Action.

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable.

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

... (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Actions to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request

exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel. ...

COUNTERSTATEMENT OF THE CASE

John Edwards, the respondent, is a black employee with an excellent record in the Transportation Department of petitioner Boeing Vertol Company, where he has worked since 1952. In this lawsuit, he challenged the petitioners' failure to promote him because of his race and their retaliation against him for testifying against Boeing. The company allowed petitioner William Platt, manager of Boeing Vertol's Transportation Department, to exercise unfettered discretion when he appointed ten white and no black employees as supervisors over a period of fifteen years from a racially mixed candidate pool. After Mr. Edwards filed a charge of race discrimination with the E.E.O.C. in 1973, and testified against

Boeing at a class action trial in 1974, Mr. Platt named his first black supervisor, who was not Mr. Edwards.

At the time he filed his E.E.O.C. charge, Mr. Edwards was a member of a pending F.R. Civ. P. 23(b)(2) class of "all Negro persons who have been employed by Boeing Vertol" between certain dates. See Croker v. The Boeing Company (Vertol Division), 437 F. Supp. 1138 (E.D. Pa. 1977); 444 F. Supp. 890 (E.D. Pa. 1977); 23 FEP Cases 1783 (E.D. Pa. 1979); aff'd in part, 662 F.2d 975 (3rd Cir. 1981) (en banc). Mr. Edwards was neither a named plaintiff nor an intervenor in Croker, but he testified in 1974 as an individual class member.

The trial court in Croker found no company-wide pattern of race discrimination. Its discussion of its finding against the

inference of discrimination in promotions focuses entirely on company-wide statistical evidence. 437 F. Supp. at 1190-91. Crucial to the Third Circuit's affirmance of this point as "not clearly erroneous," was evidence of a Supervisory Selection Board which acted to curb the perpetuation of individual bias on a company-wide basis by recommending the appointment of blacks for 16% of the supervisory promotions. 662 F.2d at 994; 437 F. Supp. at 1151. The trial court's holding against the class explicitly did "not preclude findings of individual acts of discrimination." 437 F. Supp. at 1192. In fact, it did find individual instances of race discrimination and harassment as to four named plaintiffs and also purported to find for two class member witnesses and against Mr. Edwards and certain other witnesses. Id. at 1192-97.

On the post-verdict motion of Boeing (by counsel for petitioners in this case), the district court dismissed the successful claims of the two class member witnesses who were neither named plaintiffs nor intervenors, based on the Third Circuit holding in Dickerson v. U.S. Steel Corp., 582 F.2d 827 (3rd Cir. 1978), that trial courts have no power to decide individual claims of class member witnesses who are neither named plaintiffs nor intervenors. See Croker, 23 FEP Cases at 1788 (not reported elsewhere). The Third Circuit affirmed those dismissals in Croker on appeal, 662 F.2d at 997-98. Boeing, however, never moved to vacate the "finding" against Mr. Edwards or the other unsuccessful individual class member witnesses.

On appeal to the Third Circuit, the Croker class attorneys sought to reverse

the district court's finding against Mr. Edwards on the merits, 662 F.2d at 997, but the Third Circuit explicitly declined to reach the merits of Mr. Edwards' claim, based on the no-jurisdiction holding of Dickerson. Croker, 662 F.2d at 997-98 n.12. Thus, the trial court's findings concerning Mr. Edwards' individual claim were treated by the Third Circuit as if they had never been rendered.

In this present case, which Mr. Edwards filed in 1980 (before the Third Circuit decision in Croker) to vindicate his individual claim, Boeing filed a motion for summary judgment shortly before the 1982 trial, raising res judicata and collateral estoppel. The Edwards district court held those motions pending trial, and when after trial it found against Mr. Edwards on the merits during the period from 1973 forward, the court found it "unnecessary ... to reach"

the defenses of res judicata and collateral estoppel for that period. A-23.

The Edwards district court further ruled, in keeping with an earlier order denying discovery of facts covered by the Croker limitations period but predating the filing of Mr. Edwards' E.E.O.C. charge, that Mr. Edwards was foreclosed from attempting to prove that he was discriminated against between 1965 and 1973. The district court's ruling was based on a combination of the view that Mr. Edwards was not entitled to the benefit of the Croker limitations period, and that the Croker case settled any discrimination issues based on facts occurring between 1965 and 1973. Appendix in the Court of Appeals, A244-257 (Transcript April 5, 1982). Thus, the facts of Mr. Edwards' case, whether viewed as background evidence or as the basis for relief, have not yet been fully stated on the record.

In its decision below, the Third Circuit recognized that Mr. Edwards has not sought to relitigate whether Boeing Vertol engaged in a company-wide pattern or practice of race discrimination, the issue decided in Croker. A-12, Edwards v. Boeing Vertol Co., 717 F.2d 761, 767 (1983). In this case, Mr. Edwards has sought only to prove that he, individually, was discriminated and retaliated against by Boeing Vertol through Mr. Platt, the manager of the Transportation Department, where the practice was different from the company-wide practice for choosing employees for promotion. The Supervisory Selection Board -- the existence of which was crucial to the finding of no company-wide discrimination -- did not operate to review decisions in promotions in the Transportation Department, where Mr. Edwards is and has been employed. In his department, the company did not prevent subjective

decision-making by Mr. Platt. In Croker, where the focus of the class attorneys was on the interest of the class and not individuals, they did not present statistics analyzing the Transportation Department separately from the rest of Boeing.

In ruling on Mr. Edwards' appeal, the Third Circuit recognized that res judicata does not bar Mr. Edwards' individual, atypical claims. In addition, since the Third Circuit had earlier refused to review the individual "findings" of the Croker court which had no power to make them, it rejected the collateral estoppel contention of petitioners because there was no "opportunity for appellate review." A-13, 717 F.2d at 767.

The Third Circuit granted a new trial to Mr. Edwards on two grounds. First, the

court held that the district court erroneously limited discovery and proof to acts of discrimination occurring after May 25, 1973, 180 days before he filed his individual charge with the E.E.O.C. The Third Circuit held that Mr. Edwards was entitled to a tolling of the statute of limitations based on the class action filing until a final adversary determination of the class claims rendered on September 30, 1981. Since Mr. Edwards filed his complaint in court on December 24, 1980, while the class action was pending in Croker, the Third Circuit held that he had a right to discovery and proof under Title VII back to March 23, 1968, and under §1981 back to September 2, 1965. Second, the Third Circuit held that Mr. Edwards was entitled to a jury trial, since he did not waive one when he filed a pro se complaint before he was represented by counsel, a holding not contended by

petitioners to merit plenary review by this Court. Petition at 8 n.6.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Present Petitioners' Question No. 1, Because Respondent Did Not Challenge Any Finding "Necessary To The Disposition Of A Classwide Claim Of A Pattern And Practice Of Discrimination"

Petitioners' entire argument that the holdings of the Court below on res judicata and collateral estoppel merit this Court's review rests on the false factual premise that the Croker trial court's "findings" about Mr. Edwards were "necessary" to its determination of the class claims in that case. Petition at 7, 9. In fact, however, when the Croker court denied the class claim of a company-wide pattern and practice of race discrimination, it did not rely on Mr. Edwards' individual facts at all. The

district court in Croker explicitly held, as affirmed by the Third Circuit, that its finding against the class did not preclude findings of individual instances of racial discrimination. Indeed, the fact that the district court found both for and against various individuals independently of the class claims vitiates any argument that those findings were "necessary" or even related to the claims of the class as a whole.

Although the class attorneys did present Mr. Edwards' testimony in an attempt to bolster the class claim, the trial court never relied on Mr. Edwards' testimony in its finding against the class. Mr. Edwards' testimony in Croker related only to the issue of discrimination against him in promotions to supervision in his department. The Croker court's discussion of its ruling against the

class on the promotion issue focused not on Mr. Edwards, but on the insufficiency of the plaintiffs' statistical evidence as rebutted by Boeing Vertol. 437 F. Supp. at 1190-91. Although the court mentioned in general discussion that it considered the illustrative individual situations and the evidence of individual class members, id. at 1177, 1192, nothing related to Mr. Edwards' testimony formed the basis of its conclusion concerning discrimination against the class. The trial court in Croker discussed Mr. Edwards solely under the heading "Individual Plaintiffs" (which Mr. Edwards was not), id. at 1166, 1176, and "Individual Claims," id. at 1192, 1197. No "finding or conclusion" of the Croker court as to Mr. Edwards individually was necessary to its class action holding. Thus, petitioners' res judicata and collateral estoppel arguments

are without factual foundation, and need not be addressed on review by this Court.

II. Even Affirmance By This Court In Cooper Would Not Bar Mr. Edwards' Individual Claim, Because He Is Not Contesting Any Finding Or Holding Of The Court Below Which Is Res Judicata

A second reason for denying the writ is that this case is not governed, as petitioners say, by the outcome of E.E.O.C. v. Federal Reserve Bank of Richmond, 698 F.2d 633 (4th Cir.), cert. granted sub nom. Cooper v. Federal Reserve Bank of Richmond, No. 83-185, 52 U.S.L.W. 3342 (U.S. October 31, 1983) ("Cooper"). Even an affirmance by this Court of Cooper would not require a change in this case. In Cooper the Fourth Circuit held that there was "no discrimination," 698 F.2d at 674, while the Croker court explicitly held that its decision in favor of the employer

on the class issue was not a determination that individual employees had not been victims of discrimination. 437 F. Supp. at 1192. That is all that was affirmed by the Third Circuit in Croker, 662 F.2d at 997. Therefore, no holding in Croker is res judicata to Mr. Edwards' individual claims.

Thus, even if Cooper is affirmed, it cannot stand for the proposition, as petitioners argue in their brief, that every single atypical claim is barred, when the trial court expressly denied any intent to accomplish that result. Because of the factual independence of this case from Cooper, there is no cause to hear the two matters in tandem.

III. No Collateral Estoppel Issue Is Appropriately Before This Court, Because The Trial Court In Croker Had No Power To Find Against Mr. Edwards Individually; Since Those Findings Were A Nullity, The Third Circuit Never Reviewed Them On Appeal

Petitioners further argue that this case should be taken up as a companion to or substitute for Cooper because it supposedly offers an opportunity to decide issues of collateral estoppel as well as res judicata. However, there is in fact no collateral estoppel issue here.

Collateral estoppel applies only to findings as to parties or those who have actual control over the litigation. Montana v. U.S., 440 U.S. 147, 154 (1979). In this case, where the Croker court had no jurisdiction over Mr. Edwards as an individual claimant, and where no claim could possibly

be made that he directed the class case, the findings on his individual situation cannot estop his later claim. The trial court in Croker had no jurisdiction to make individual findings binding on Mr. Edwards, because he was not before it as a party. He was merely a class member witness, not a named plaintiff or an intervenor.

In addition, where Mr. Edwards could not obtain review of his claim in the Court of Appeals in Croker because of that court's conclusion that the Croker trial court had no power to make the findings, Mr. Edwards cannot be estopped from litigating his claim in a forum where he is represented by his own counsel, and where he has his first full and fair opportunity to proceed with both trial and appeal on his individual claim. See Restatement (2d) of Judgments, §28(1), (3), Comments a & h (1982).

Petitioners repeatedly characterize the Court of Appeals' conclusion that Mr. Edwards is not collaterally estopped as to his individual claim as based on a "sua sponte assertion," that Mr. Edwards had no "opportunity for appellate review" by the writer of the Third Circuit opinion, Petition at 8. However, this "assertion" on behalf of a unanimous panel comes from the published opinion of the Third Circuit in Croker v. The Boeing Company, 662 F.2d at 998 n.12. The Croker appellate court refused to reach the merits of the trial court's findings in Croker relating to Mr. Edwards, although the class attorneys had attempted to appeal those findings for him. Thus, he could not obtain appellate review of those findings on the merits.

Petitioners' argument appears to imply that Mr. Edwards had an "opportunity" because

he could have intervened and because the class attorneys did seek review. However, where those findings were made outside of the trial court's power in Croker, intervening for appeal would have achieved no different result, because the findings without jurisdiction were a nullity. The appellate court's refusal to consider them on the merits where the class attorneys had specifically sought reversal demonstrates this conclusively.

Indeed, where no petition for certiorari was filed in Croker, the judgment of the Third Circuit that the findings against Mr. Edwards were a nullity and not reviewable is a final judgment that is "law of the case" and res judicata. Boeing cannot now be heard to challenge whether or not Croker and Dickerson were "correctly decided." Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981).

Moreover, the Third Circuit's resolution of the collateral estoppel question in Edwards is entirely consistent with this Court's treatment of related questions. The Third Circuit's approach avoids the danger of serious constitutional due process problems inherent in petitioners' proposal to bind individual class members like Mr. Edwards with factual and legal interests atypical of the class. See Hansberry v. Lee, 311 U.S. 32 (1940), where this Court long ago held that binding unrepresented parties with differing interests offends due process. In American Pipe & Construction Co. v. Utah, 414 U.S. 538, 549 (1974), this Court read F.R. Civ. P. 23 to offer class members the choice of becoming "either non-parties to the suit and ineligible to participate in a recovery or to be bound by a judgment, or ... full members who must abide by the final

judgment, whether favorable or adverse."[1] In contrast petitioners propose to render class actions a "one-way-street" for defendants. Petition at 9. The same counsel for Boeing argued successfully in Croker that individuals who had proved individual claims against them in the class action but were not named parties could not recover as individuals when they had not intervened in the class action. Croker, 23 FEP at 1788, aff'd,662 F.2d at 997-98. Now, however, they want Mr. Edwards to be individually bound, when he could not recover or obtain review because of his non-party status.

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[1] In contrast to the Cooper petitioners and the F.R. Civ. P. 23(b)(3) and (c)(2) class members discussed in American Pipe,who are provided a notice informing them of their right to opt in or out of the class, Mr. Edwards was a member of a (b)(2) class. While he was aware of the class action as a witness, he was never notified by the court that he would have to opt out of the class case or be bound, even as to his individual claim, separate from the class.

Additionally, if the petitioners' position were to prevail, a class member with no opportunity to recover on his individual case would risk preclusion of his claim if he testified as a witness. The class member in Mr. Edwards' position would thus have little to gain and much to lose from offering his testimony. This Court, in a unanimous opinion authored by the Chief Justice, has cautioned against the judicial formulation of any rule that would risk such discouragement of witnesses from testifying. See Bronston v. United States, 409 U.S. 352, 359 (1973). Such a rule would have damaging ramifications throughout the litigation process. To cite but one example, a witness called upon to testify to a criminal defendant's prior similar acts under F.R.E. 404(b) could lose the opportunity to sue the victimizer if his or her testimony were discredited by the court.

In summary, collateral estoppel is not an issue in this case, and cannot be used as the basis for an argument that Edwards should be taken up with Cooper. However, even if this Court does view the collateral estoppel issue as one which might be raised by the facts of this case, certiorari at this stage would be inappropriate in light of the incomplete record occasioned by the district court's order denying pre-1973 discovery, and the necessity of remand for a jury trial based on a full factual presentation.

IV. Petitioners' Claim Of Conflict In The Circuits On The Statute Of Limitations Issue Is Spurious, Because The D.C. Circuit Footnote Relied On By Petitioners Antedates This Court's Most Recent Guidance In The June 1983 Decision In Crown, Cork & Seal v. Parker

Petitioners argue that certiorari should be granted in this case because of a claimed conflict between the Third Circuit's decision below and the D.C. Circuit decision in Wachovia Bank and Trust Co. v. Nat'l Student Marketing Corp., 461 F. Supp. 999 (D.C. 1978), aff'd in pertinent part, 650 F.2d 342 (D.C. Cir. 1980), cert. denied, 452 U.S. 954 (1981). In fact, however, no such conflict exists.

The panel below relied on the most recent teaching of this Court in holding that Mr. Edwards, as a class member in the Croker case, was entitled to the benefits of the tolling of the statute of limitations until the final adverse determination of

the class claim, based on Crown,Cork & Seal Co. v. Parker, 462 U.S. , 103 S. Ct. 2392, 76 L. Ed.2d 628 (1983). Wachovia Bank, by contrast, predates the Crown Cork decision, and does not present a currently reliable contrast to the holding of Edwards v. Boeing. Crown,Cork removes an analytical underpinning of Wachovia, and renders petitioners' claim of a conflict in the Circuits at best premature, as is more fully described below.

Both the district court and the Court of Appeals in Wachovia based their denial of the tolling of the statute of limitations in part on those plaintiffs' failure to intervene. Crown,Cork made clear that intervention is not a requirement for the tolling of the statute of limitations but that a class member may file his own individual suit in order to claim tolling after the class action has been determined inappropriate. It

cannot be said that the District of Columbia Circuit would now decide Wachovia identically to its passing reference in 650 F.2d at 346 n.7, had it had the benefit of this Court's opinion in Crown, Cork & Seal Co. v. Parker. Thus, the purported "conflict" between the Third and D.C. Circuits is at best only speculation.

V. This Case Is Unusual, Unimportant To Anyone But The Parties, And Does Not Merit This Court's Review

Mr. Edwards' case is an unusual one in that he believed that he was a typical class member throughout the pendency of the Croker case. Only when the classwide claim failed in part because of company-wide statistics and because of the Supervisory Selection Board (which operated to curb individual subjective bias against minorities in the achievement of 16% black supervisory pro-

motions company-wide) did it become apparent that Mr. Edwards' claim of discrimination in promotion in the Transportation Department was atypical of the claims of the class. Mr. Platt, manager of the Transportation Department, in the ten supervisory promotions of white males he made over a fifteen year period, bypassed the unquestionably qualified Mr. Edwards, without input or control from the Supervisory Selection Board.

Although the district court in Croker certified an across-the-board class of employees discriminated against because of race, a certification prior to and perhaps questionable in light of General Telephone Co. v. Falcon, 457 U.S. 147 (1982), Mr. Edwards' situation is analagous not to the Cooper plaintiffs', but to that of the class members in Crown,Cork, 76 L.Ed.2d at 632, where class certification was denied by the district

court because of atypicality. The decision against the class on the merits in Croker revealed that the named plaintiffs who made an across-the-board claim could not represent Mr. Edwards' individual claim because the unique practice of Mr. Platt in the Transportation Department differed from company-wide practice. There is no functional or analytical reason why Mr. Edwards as a member of a certified class could not rely on that certification to toll his claims until the decision was made that class claims were denied in the Croker case on grounds which rendered his claim atypical. Respondent submits that such circumstances will be unusual in the future, in that most supporting witnesses in properly certified post-Falcon class actions will in fact be complaining of the same discrimination being challenged by the class, or will realize earlier the necessity of filing a separate suit under the principles of Falcon.

Petitioners contend that a rule permitting atypical individuals to sue separately would irreparably prejudice them. However, in Mr. Edwards' case, the record reflects that because Mr. Edwards participated as a witness, and did not "sleep on his rights," petitioners are uniquely aware in his case "not only of the substance of the claims being brought against them but also of the name and generic identities of the potential plaintiffs," American Pipe, supra, 414 U.S. at 555, and in addition of the "evidence, memories, and witnesses." Crown, Cork, supra, 76 L.Ed.2d at 637 (concurrence). Indeed, at the truncated trial allowed Mr. Edwards in this case, respondents had the transcribed testimony of Mr. Platt in the Croker case available when his memory of prior events failed him. The fact that another witness died in 1975, after Mr. Edwards filed his individual charge with E.E.O.C. in 1973, does not relate to the tolling of the statute

of limitations prior to 1973 which is presented to the Court in this case. In any event, the petitioners' claimed issue of prejudice has neither been established on the record nor fully litigated or argued by both sides before any trial court.

The rule proposed by petitioners to limit the tolling of the statute of limitations to class members in cases where the class is decertified as in Crown,Cork & Seal will not result in uniform fairness to defendants. The timing of class decertification may indeed be as late in a case as a finding against the class on the merits because of lack of a company-wide pattern or because of atypicality. In General Telephone v. Falcon, supra, this Court stressed the "inherently tentative" nature of a class certification until the trial court has sufficient evidence to make a "rigorous analysis, that the prerequisites of Rule 23(a)

have been satisfied." 457 U.S. at 160, quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 n.11 (1978). In cases like Croker, this may occur eight years or more after the original filing of the complaint.

Thus, defendants do not lose any significant protection of the tolling rule if it is interpreted to include class members whose individual claims emerge as atypical based on trial facts along with those whose classes are decertified for atypicality after extensive pretrial discovery. The alternative interpretation, by contrast, would harm the court system, in that it would require class counsel to move for protective intervention by any possibly atypical class members. Class actions would become unnecessarily complex or top-heavy, filled with intervenors, and the risk of decertification would increase. The inevitable result would be a multiplicity of individual

actions filed. This would negate any economy which Congress intended in Rule 23, and would conflict directly with the holding of American Pipe that the purpose of the Rule was to prevent protective interventions and encourage class action efficiency. 414 U.S. at 551.

Thus, not only do the petitioners ask this Court to establish a bad rule, they do so in an inappropriate case.

CONCLUSION

The petition for a writ of certiorari should be denied. The res judicata and collateral estoppel issues raised by petitioners in Question 1, are not presented in this case. Mr. Edwards as an atypical class member does not seek in his individual suit to challenge the class holding or any findings "necessary" to it, and the Court of

Appeals recognized that he had no opportunity for review of the individual findings which the class court had no power to make. Petitioners' Question 2 regarding the tolling of the statute of limitations for a class member does not merit this Court's review, because the Court of Appeals decided it consistently with this Court's teaching on the policies of class action rules only last Term in Crown, Cork & Seal Co. v. Parker. Mr. Edwards' case is unusual and not controlled by a decision in Cooper v. Federal Reserve Bank of Richmond, No. 83-185. This Court should deny the petition for certiorari and allow Mr. Edwards the first trial which will give him a full opportunity to present his individual claim of race discrimination.

Respectfully submitted,

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